

2023 WL 2069127 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: TIFFANY & CO.

Case No. G237 5680

Carrier ID No. 1139 WC 19 0000155 W193502

February 9, 2023

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Date of Accident 11/15/2018

The Full Board, at its meeting on January 24, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed June 29, 2022.

ISSUE

The issue presented for Mandatory Full Board Review is the schedule loss of use (SLU) of claimant's hands and right leg.

The Workers' Compensation Law Judge (WCLJ) awarded claimant a 10% SLU of the right leg and a 27.5% SLU of each hand.

The Board Panel majority agreed that claimant had a 10% SLU of the right leg but modified the WCLJ decision to award a 7.5% SLU of each hand.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on July 22, 2022, arguing that the credible opinion of his treating physician support awarding a 20% SLU of the right leg and a 27.5% SLU of each hand.

The carrier filed a rebuttal on August 17, 2022, arguing that the decision of the Board Panel majority should be affirmed.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

On November 15, 2018, claimant, a retail store manager, was injured when he slipped and fell. This claim is established for injuries to claimant's right pelvis and both wrists, and his average weekly wage was set at \$1, 726.12.

In his initial report, dated November 20, 2018, claimant's treating physician, Dr. Stein, diagnosed a [fracture of the acetabulum](#) of claimant's right hip.

In a February 7, 2019, report, claimant's treating physician, Dr. Ayalon, diagnosed sprain of both wrists. Dr. Ayalon noted that examination of claimant's wrists showed “[f]ull extension and flexion.”

Claimant was examined by the carrier's consultant, Dr. Nipper, on September 25, 2019. In his report, Dr. Nipper noted that the fracture of claimant's right acetabulum was healed and that on examination, claimant had full, normal range of motion of both hips and both wrists.

Dr. Stein submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a November 8, 2019, examination, finding that claimant had reached maximum medical improvement (MMI) with respect to his right [hip injury](#). On examination of claimant's right hip, Dr. Stein found that claimant had flexion to 100 degrees, abduction to 35 degrees, external rotation to 35 degrees, and internal rotation to 25 degrees. Based on these range of motion findings, Dr. Stein concluded that claimant had a 20% SLU of the right hip (leg).

*2 In a November 7, 2019, report, Dr. Ayalon noted that claimant had full flexion, extension, supination and pronation of both wrists, although he experienced “pain with maximal extension and flexion.”

In a January 2, 2020, report, Dr. Ayalon noted that on examination of his right wrist, claimant experienced “[p]ain with ulnar deviation and resisted supination[.]” but did not indicate whether claimant had any restrictions to the range of motion of his right wrist. Dr. Ayalon indicated that claimant had full flexion and extension in his left wrist.

On August 8, 2020, claimant was again examined by Dr. Nipper. In his report, Dr. Nipper stated that claimant had full range of motion of both wrists. Dr. Nipper indicated that the range of motion of claimant's right and left (contralateral) hips was identical except for flexion to 110 degrees on the right, compared to 120 degrees on the left. Dr. Nipper found that claimant had reached MMI, had no orthopedic disability, and did not require further treatment.

Dr. Ayalon submitted a C-4.3 based on a November 11, 2020, examination, finding that the injuries to claimant's wrists had reached MMI. Dr. Ayalon indicated that claimant's right wrist had flexion to 35 degrees, extension to 30 degrees, supination to 75 degrees, pronation to 80 degrees, ulnar deviation to 15 degrees, and radial deviation to 10 degrees, and that his left wrist had flexion to 35 degrees, extension to 40 degrees, supination to 75 degrees, pronation to 80 degrees, ulnar deviation to 20 degrees, and radial deviation to 15 degrees. Based on these range of motion findings, Dr. Ayalon concluded that claimant had a 27.5% SLU of each wrist (hand), 55% in total.

Claimant was again examined by Dr. Nipper on January 27, 2021. In his report, Dr. Nipper noted that ranges of motion with respect to claimant's hips and wrists were identical to those noted in his report of the August 8, 2020, examination of the claimant. Based on these range of motion findings, Dr. Nipper concluded that claimant had a 10% SLU of the right leg based on his [hip injury](#) and no SLU based on his [wrist injuries](#).

Dr. Ayalon was deposed on June 2, 2021, and testified that he began treating claimant for his [wrist injuries](#) on February 7, 2019. When asked to explain how he reached his SLU opinion, Dr. Ayalon responded:

Yes, basically, a combination of the right and left wrist range of motion measurements I made on that day. So, flexion on the left wrist, flexion of 35, extension of 30, supination 75, pronation 80, ulnar deviation 15 and radial deviation 10.

(Deposition, Dr. Ayalon, 6/2/21, pp. 6-7). When asked what SLU percentage he found for each wrist, Dr. Ayalon responded: “So, 55 percent represents the aggregate of both together because it appears that the left is slightly worse than the right” (p. 7). Dr. Ayalon found, based on the Impairment Guidelines, that claimant had a 27.5% SLU of each wrist, explaining:

***3** The range of motion is slightly worse on the left, but that range of motion still falls into the same range of ranges of motion to qualify for that percentage, essentially.

(p. 8). On cross-examination, Dr. Ayalon testified that he did not document any range of motion deficits to claimant's right wrist at the time of his January 2, 2020, examination. Dr. Ayalon acknowledged that the range of motion of claimant's wrists had worsened between his January 2, 2020, and November 11, 2020, examinations. When asked why, if claimant's range of motion had gotten worse, he found that claimant's [wrist injuries](#) had reached maximum medical improvement on November 11, 2020, Dr. Ayalon responded:

Yes, I mean, it's a moving target, so it's hard to say. Given the fact that he had full range of motion and that was closer to around the time of the injections, the likelihood of injections continuing to work to improve his, you know, symptoms of range of motion goes down. I mean, could he benefit from either another injection or another round of physical therapy?

It's possible. But, I felt that given the patient's presentation and chronicity of a year and a half, that a [wrist sprain](#), you know, lingering for a year and a half is probably going to be where he's going to end up.

(p. 16). When testing the range of motion of claimant's wrists, Dr. Ayalon would “go to tolerance. So, whatever the patient can tolerate, which is passive” (p. 17). According to Dr. Ayalon, a “patient can limit range of motion for lots of different reasons” (p. 18).

Dr. Nipper was deposed on June 29, 2021, and testified in accordance with his reports.

In a decision filed November 17, 2021, the WCLJ awarded claimant a 10% SLU of the right leg and a 27.5% SLU of each hand, approved a fee to claimant's attorneys of \$17, 800.00, and directed the carrier to pay an appearance fee of \$450.00 to Dr. Ayalon.

Both the claimant and the carrier requested administrative review of the WCLJ's November 17, 2021, decision. Claimant argued that the WCLJ decision should be modified to find that he has a 20% SLU of the right leg. The carrier argued that claimant should be found to have no SLU of the hands.

LEGAL ANALYSIS

Right Hip

In his examinations of the claimant on August 8, 2020, and January 27, 2021, Dr. Nipper found that the range of motion of claimant's right and left (contralateral) hips was identical except for flexion to 110 degrees on the right, compared to 120 degrees on the left. Pursuant to the Board's 2018 Impairment Guidelines, Dr. Nipper's credible range of motion findings do not support an SLU award exceeding the 10% SLU of the right leg found by Dr. Nipper, conceded by the carrier, and awarded by the WCLJ and the Board Panel majority.

Therefore, the Full Board finds that claimant has a 10% SLU of the right leg.

Hands

In his February 7, 2019, and November 7, 2019, reports, Dr. Ayalon noted that claimant had full range of motion of both wrists. In his January 2, 2020, report, Dr. Ayalon indicated that claimant had full range of motion of his left wrist and testified he did

not document any range of motion deficits in claimant's right wrist at the time of his January 2, 2020, examination. However, when he examined claimant on November 11, 2020, for the purpose of determining permanency, Dr. Ayalon found significant limitations to the range of motion of both of claimant's wrists.

*4 While Dr. Ayalon's November 11, 2020, range of motion findings suggest a substantial worsening of claimant's [wrist injuries](#) since his prior examination on January 2, 2020, the record does not reflect that claimant sought any treatment for his wrists between January 2, 2020, and November 11, 2020. When asked why, if claimant's range of motion had gotten worse between his January 2, 2020, and November 11, 2020, examinations, he nonetheless found that claimant's [wrist injuries](#) had reached maximum medical improvement, Dr. Ayalon responded: "Yes, I mean, it's a moving target, so it's hard to say. Given the fact that he had full range of motion and that was closer to around the time of the injections, the likelihood of the injections continuing to work to improve his, you know, symptoms of range of motion goes down" (Deposition, Dr. Ayalon, 6/2/21, p. 16). However, Dr. Ayalon's vague explanation that his earlier findings of full range of motion of claimant's wrists was due to the temporary effect of wrist injections is not credible given the stark contrast between the ranges of motion found during his permanency examination and his earlier examinations. Moreover, Dr. Ayalon conceded that a patient can limit his range of motion.

Dr. Nipper's credible finding that claimant had full range of motion of both wrists at the time of his January 27, 2021, permanency examination is consistent with the findings made during his prior examinations of the claimant on September 25, 2019, and August 8, 2020, as well as with Dr. Ayalon's range of motion findings at his February 7, 2019, November 7, 2019, and January 2, 2020, examinations of the claimant.

Therefore, the Full Board finds that claimant has a 7.5% SLU of each hand, as conceded by the carrier.

Attorney's Fee

In an OC-400.1 (Application for a Fee by Claimant's Attorney or Licensed Representative) filed July 22, 2022, claimant's attorneys requested a fee of \$21, 675.00. At the time the OC-400.1 was filed, [12 NYCRR 300.17\(f\)](#) provided that a fee approved by the Board should be "in an amount commensurate with the services rendered and having due regard for the financial status of the claimant...." Here, the Full Board finds that a fee of \$5, 000.00 is supported by the record.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed November 17, 2021, is MODIFIED to find that claimant has a 10% SLU of the right leg, a 7.5% SLU of each hand, and to reduce the fee to payable to claimant's attorneys to \$5, 000.00. No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

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